

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

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75-1289

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

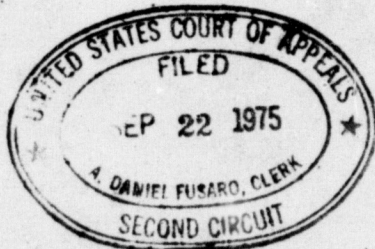
RICHARD HAUPTNER,

Appellant.

Docket No. 75-1289

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SHEILA GINSBERG,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
RICHARD HAUPTNER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CARTER

75 CRIM. 99

D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U.S.:
vs.		Barbara S. Ambler Sp. Atty. 791-1154
PATRICK SHERRY 7-30-75		
JULIUS CELENTANO, JR. 6-16-75		
RICHARD HAUPTNER 7-3-75		
Deft. R. Hauptner: Friedman, Friedman, & Levy 655 Madison Ave, NYC 10021 371-9133		For Defendant: Patrick Sherry Mary McDonnell 528 City Island Ave. Bx, NY 10464 885-1234 Celentano--Robert Blossner 250 Bdwy, NYC 10007 571-0805

(12) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	7/11/75	Hauptner	5-	
J.S. 3 mailed	Marshal	7/15/75	Sherry		5-
Violation	Docket fee	8/4/75	Cassard	5-	
		8/26/75	Sherry		5-
Title 18: 26:					
Sec. 371, 922(a)(1) 5861(a) and 5861(d)					
Consp. to viol. gun control act. (Ct. 1)					
Dealing in firearms without a license. (Ct. 2)					
Dealing in Title II weapons without an occupational stamp or paying tax. (Ct. 3)					
Possess. of an unregistered firearm. (Cts. 4-6)					
			(Six Counts)		

DATE	PROCEEDINGS
1-30-75	Filed indictment. Case assigned to Judge Carter as a related matter. (74Cr 1119)
02-07-75	PATRICK SHERRY--Filed notice of appearance by Mary McDonnell of 528 City Island Ave, Bronx, NY 10464
02-07-75	PATRICK SHERRY-- (atty. present)--deft. withdraws plea of not guilty and pleads GUILTY to counts 1 & 2. P.S. R. ordered. Sentence adj. without date at this time or at the conclusion of the trial. Bail contd. at \$100,000 secured by \$35,000 cash. Carter, J.
02-06-75	RICHARD HAUPTNER--Deft. fails to appear. Court directs entry of plea of Not Guilty. Feb. 18, 1975 for motions. Bail on this indictment is contd. at \$100,000 P.R.B. secured by \$3,500 cash. Bail limits extended to the states of New Jersey and Connecticut as well as SNY. Carter, J.

DATE	PROCEEDINGS
04-02-75	Filed govts. notice of readiness for trial.
05-07-75	CELENTANO, JR.--Filed defts. affdt. and notice of motion for an order suppressing certain evidence, ret. on: May 7, 1975 at 9:30am.
05-08-75	CELENTANO, JR.--Filed memo end. on above motion--Motion denied, Carter, J. m/n
05-07-75	CELENTANO(atty. Robert Blossner, present)--deft. pleads not guilty. Bail fixed by Mag. in the sum of \$50,000 PRB secured by \$5,000 cash. Bail limits ext. to EDNY and New Jersey is contd. Carter, J.
05-07-75	CELENTANO--Suppression hearing begun and concluded. Motion to suppress i denied. Carter, J.
05-07-75	CELENTANO HAUPTNER---Jury trial begun before Carter, J.
05-08-75	Jury trial contd.
05-09-75	" "
05-12-75	" "
05-13-75	Jury trial contd. and concluded. Jury verdict as follows: CELENTANO HAUPTNER GUILTY --cts. 1 and 2 NOT GUILTY-- 3, 4, 5, & 6 GUILTY---all six counts PSR ORDERED. Sentences adj. to June 16, 1975 at 10am in Rm. 36. Bail cont as to both defts. Carter J.
06-16-75	JULIUS CELENTANO JR--Filed JUDGMENT(atty. Robert Blossner, present)--the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for imprisonment as a Young Adult Offender pursuant to Title 18, USC, Section 5010(b) for treatment and supervision as ext. by Title 18, USC Section 4209, until discharged by the Federal Youth Correction Division of the Board Parole as provided in Title 18, USC 3017(c). On deft. counsel's motion, the open indictments, 74 CR 1113 and 74 CR 1171 are dismissed with consent of the govt. Bail pending appeal is fixed at \$50,000 PRB, secured by \$5,000 cash. Bail limits are the Eastern District of NY the State of New Jersey and SDNY. Carter, J. (copies issued)
06-17-75	RICHARD HAUPTNER(atty. Robert Levy, present)--Deft. moves by motion for a new trial. Govt. to file reply papers by June 20, 1975. A hearing will then be held if the court determines that the motion has some merit. Sentence adj. to June 24, 1975 at 10am. Carter, J. PATRICK SHERRY--Sentence adj. without date. Carter, J.

(see Pg. 3)

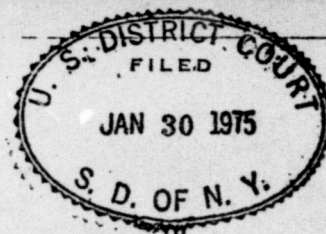
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D. C. 110 Rev. 6-78 Docket Continuation

DATE	PROCEEDINGS	Date Of Judgment
06-24-75	JULIUS CELANTANO, JR.--Filed defts. notice of appeal to the USCA from the judgment of June 16, 1975. (copies mailed to AUSA and to deft. at 2525 Wilson Ave, Bx, NY 10469)	
07-02-75	JULIUS CELENTANO, JR.--Filed AMENDED JUDGMENT (atty. Robert Blossner, present)--the judgment of June 16, 1975 is amended as follows: IT IS ADJUDGED that the deft. is sentenced as a Young Adult Offender pursuant to Title 18, USC, Section 5010(b) for treatment and supervision as next. by Title 18, USC, Section 4209, until discharged by the Federal Youth Correction Div. of the Board of Parole as provided in Title 18, *USC, Section 5017(c). The imposition of sentence is hereby suspended and the deft. is placed on probation for a period of EIGHTEEN(18) months and subject to the standing probation order of this court. A special condition of probation being that in the event a violation of probation is charged, the defts. probation will be revoked and the deft. is to serve the period of confinement which was previously suspended by this court. Carter, J. (copies issued)	
07-07-75	R. HAUPTNER--Filed govts. response affdt. of Barbara Ambler.	
07-07-75	R. HAUPTNER--Filed defts. reply affdt. of Robert Levy.	
07-07-75	R. HAUPTNER--Filed govts. memorandum of law.	
07-07-75	R. HAUPTNER--Filed defts. affdt. and notice of motion for new trial, ret. on: June 17, 1975 at 10am, etc.	
07-07-75	R. HAUPTNER--Filed memo end. on above motion--Motion is denied as indicated on the record in open court today. So ordered, Carter, J.	m/n
07-03-75	RICHARD HAUPTNER--Filed JUDGMENT (atty. Robert Levy, present) the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of FIVE(5) YEARS on ct. 1; FIVE(5) YEARS on ct. 2; SEVEN(7) YEARS on ct. 3 and SEVEN(7) YEARS on cts. 4, 5 and 6 to run concurrently with each other. Carter, J. (copies issued)	
07-10-75	RICHARD HAUPTNER--Filed defts. notice of appeal to the USCA from the judgment entered on July 3, 1975. (copies mailed to AUSA and to deft. at FDH, 427 West St, NYC.)	
7-10-75	PATRICK SHERRY--(atty. Mary McDonald, present)--FILED JUDGMENT--the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment as a Young Adult Offender pursuant to Title 18, USC, Section 5010(c) for treatment and supervision as extended by Title 18, USC, Section 4209 for a period not to exceed SIX(6) MONTHS until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Title 18, USC Section 5017(d). On deft.'s counsel's motion, the open counts 3, 4, 5 and 6 are dismissed with the consent of the govt. The deft. is ordered to surrender to the U.S. Marshal to commence service of his sentence on July 17, 1975 at 10am. The deft. is released on his own recognizance to the time of surrender. The court orders commitment to the custody of the Atty. General and recommends that the deft. Patrick Sherry be incarcerated for a period not to exceed six(6) monthsh. Carter, J. (copies issued)	

DATE	PROCEEDINGS	Date Ord Judgment
07-03-75	RICHARD HAUPTNER(atty. Robert Levy present)--Application to fix bail pending appeal is denied after an in-camera hearing, Carter, J.	
07-17-75	PATRICK SHERRY--Surrender date is adj. to July 21, 1975. Carter, J.	
7/18/75	<i>R. Hauptner</i> and commitment & entered return, Debt delivered to Warden, 70 H - on 7/13/75.	
07-22-75	R. HAUPTNER--Filed defts. affdt. and notice of motbn for reduction of sentence ret. on: July 28, 1975.	
07-17-75	Filed transcript dated May 7, 1975. (filed in 74 CR 1118) <i>(also see 74 Cr. 1171)</i>	
07-25-75	R. HAUPTNER--Filed memo end. on defts. motion dated July 22, 1975 to reduce sentence--Motion to reduce sentence is withdrawn at the request of the defts. wife who called my chambers and spoke with my clerk on July 23, 1975 without prej. to renewal. So ordered, Carter, J. m/n	
07-30-75	Filed transcript of record of proceedings dated May 8, 9, 12, 13, 1975 & July 3, 1975. (also docketed in 74 CR 1118 & 74 CR 1171) (filed in this	
07-30-75	^{AMENDED} PATRICK SHERRY- Filed Judgment that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS on cts. 1 and 2 to run conc. with each other, to be served on weekends at the Federal Detention Headquarters, at St. Andrews Plaza, New York City. The defendant shall surrender on Friday August 8, 1975 at 6 P.M. to commence service of this sentence. == Carter, J. copies issued.	
7/24/75	<i>Hauptner</i> Filed commitment & entered return, Debt delivered to Warden, 70 H. on 7/13/75 + on 7/11/75 deft. trans. to Lewisburg, Pa.	
08-01-75	R. HAUPTNER--Filed notice that the original record on appeal has been certified and transmitted to the USCA this date.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

- v -

PATRICK SHERRY,
JULIUS CELENTANO, JR.
and RICHARD HAUPTNER,

Defendants.

INDICTMENT

S-75 Cr.

75 CRIM. 99

COUNT ONE

The Grand Jury charges:

1. From in or about June, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons known and unknown to the Grand Jury, to commit offenses against the United States, to wit, to violate Sections 922(a)(1) of Title 18, United States Code, and Sections 5861 (a) and (d) of Title 26, United States Code.

2. It was part of said conspiracy that the said defendants would engage in the business of dealing in firearms at a time when the said defendants were not licensed importers, licensed manufacturers or licensed dealers, in violation of Title 18, United States Code, Section 922(a)(1).

3. It was a further part of said conspiracy that the said defendants would engage in business as dealers in firearms, as defined in Title 26, United States Code, Section 5845, without having paid the special (occupational) tax imposed on such business by Section 5801, Title 26, United States Code, and without having registered with the Secretary of the Treasury or his delegate pursuant to Section 5802, Title 26, United States Code, all in violation of Section 5861(a), of Title 26, United States Code.

CROFILM

JAN 30 1975

4. It was a further part of said conspiracy that said defendants would possess firearms, as defined in Title 26, United States Code, Section 5845, to wit, a Universal M-1 Carbine, a silencer for said carbine, and a sawed-off rifle, which were not registered to any of them in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Section 5861(d).

5. Among the means by which the said defendants would and did carry out their agreed upon unlawful purposes were the following:

a) The defendant RICHARD HAUPTNER would and did supply the defendants PATRICK SHERRY and JULIUS CELENTANO, JR. with both assembled and unassembled parts for .22 caliber Der-ringers, .22 caliber revolvers and .25 caliber automatic pistols.

b) The defendant PATRICK SHERRY would and did then store said handguns and assemble said parts into handguns in his home.

c) The defendants PATRICK SHERRY and JULIUS CELENTANO, JR. would and did then sell said handguns.

d) The defendant RICHARD HAUPTNER would and did cut down weapons and fit them with silencers for their sale by defendant PATRICK SHERRY.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed by the defendants in the Southern District of New York:

1. On or about August 4, 1974, the defendants PATRICK SHERRY and JULIUS CELENTANO, JR. met at the Baychester Diner, Bronx, New York to discuss the sale of handguns.

2. On or about September 3, 1974, the defendant RICHARD HAUPTNER supplied defendant PATRICK SHERRY with a silencer for an M-1 Carbine.

3. On or about September 11, 1974, the defendants PATRICK SHERRY and JULIUS CELENTANO, JR. sold twelve (12) .22

caliber Derringers and fifteen (15) .22 caliber revolvers, at the home of the defendant PATRICK SHERRY in City Island, Bronx, New York.

4. On or about November 26, 1974, the defendant RICHARD HAUPTNER supplied defendant PATRICK SHERRY with four (4) .25 caliber automatic pistols and two (2) .22 caliber revolvers, at the home of the defendant RICHARD HAUPTNER, in City Island, Bronx, New York.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

From in or about June, 1974, up to and including the 26th day of November, 1974, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants, unlawfully, wilfully and knowingly did engage in the business of dealing in firearms, including those specified below, at a time when the said defendants were not licensed importers, licensed manufacturers or licensed dealers:

<u>Quantity</u>	<u>Description</u>	<u>Manufacturer's Stamp</u>
Forty-four (44)	.22 caliber Derringers, without serial numbers	None
Thirty-four (34)	.22 caliber revolvers, without serial numbers	CDM Products, Inc. New York, New York
Twenty-one (21)	.25 caliber automatic pistols, without serial numbers	Valor Import Corporation, CDM, Hialeah, Florida
Fourteen (14)	.22 caliber Derringers, without serial numbers	CDM Products, Inc. New York, New York
Seven (7)	.25 caliber automatic pistols, without serial numbers	Valor Corporation
Five (5)	.25 caliber automatic pistols, without serial numbers	Galesi, Florida Fire- arms Corp. Miami, Florida
Two (2)	.22 caliber Derringers, without serial numbers	Firearms International Corp., Washington, D.C.
One (1)	.38 caliber revolver, serial number K322373	Smith and Wesson

<u>Quantity</u>	<u>Description</u>	<u>Manufacturer's Stamp</u>
One (1)	.25 caliber automatic pistol, serial number 008239	R. G. Industries Miami, Florida
One (1)	.25 caliber automatic pistol, serial number 23174	Valor Arms

(Title 18, United States Code, Sections 922(a)(1),
924 and 2)

COUNT THREE

The Grand Jury further charges:

From on or about the 3rd day of September, 1974, up to and including the 6th day of October, 1974, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants, unlawfully, wilfully and knowingly did engage in business as dealers in firearms, as defined in Title 26, United States Code, Section 5845, to wit, a Universal M-1 Carbine, serial number 208760, with a barrel length of 11-1/8" and an overall length of 21 1/4", a silencer for said firearm, said silencer being 10 1/2" long and 1 1/2" in diameter, and a Terne rifle, 7.65 mm., barrel length of 9" and an overall length of 20 5/8", with serial number E2158, without having paid the special (occupational) tax imposed on such business by Section 5801, Title 26, United States Code, and without having registered with the Secretary of the Treasury or his delegate pursuant to Section 5802, Title 26, United States Code.

(Title 26, United States Code, Sections 5861(a) and
5871 and Title 18, United States Code, Section 2)

COUNT FOUR

The Grand Jury further charges:

On or about the 3rd day of September 1974, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants did unlawfully, wilfully and knowingly possess a firearm, as defined in Title 26, United States Code, Section 5845, to wit, a Universal M-1 Carbine, serial num-

ber 208760, with a barrel length of 11 1/8" and an overall length of 21 1/4", which was not registered to any of them in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Sections 5861(d) and 5871 and Title 18, United States Code, Section 2)

COUNT FIVE

The Grand Jury further charges:

On or about the 3rd day of September, 1974, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants did unlawfully, wilfully and knowingly possess a firearm, as defined in Title 26, United States Code, Section 5845, to wit, a silencer for a firearm, said silencer being 10 1/2" long and 1 1/2" in diameter, which was not registered to any of them in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Sections 5861(d) and 5871 and Title 18, United States Code, Section 2)

COUNT SIX

The Grand Jury further charges:

On or about the 5th day of October, 1974, in the Southern District of New York, PATRICK SHERRY, JULIUS CELENTANO, JR. and RICHARD HAUPTNER, the defendants did unlawfully, wilfully and knowingly possess a firearm, as defined in Title 26, United States Code, Section 5845, to wit, a Terne rifle, 7.65 mm., barrel length of 9", and an overall length of 20 5/8", with serial number E2158, which was not registered to any of them in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Section 5861(d) and 5871 and Title 18, United States Code, Section 2)

Anna Haden
Deputy FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

PATRICK SHERRY, JULIUS
CELENTANO, JR., and
RICHARD HAUPTNER,

Defendants.

INDICTMENT

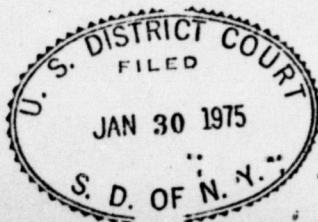
PAUL J. CURRAN

United States Attorney

A TRUE BILL

Anna Haden
Deputy Foreman

FPI-83-1-13-70-20M-4923



FEB 6 1975

(Defts atty Robert Levy present)
Deft Richard Hauptner fails to appear. Court directs entry of plea of Not Guilty. Feb-18, 1975, for motions. Bail on this indictment is cont'd at \$100,000 P.R.B. secured by \$3,500 Cash. Bail limits extended to the states of New Jersey + Conn as well as S.D.N.Y. same as 74 cr 1171. Carter, J.

FEB 7 1975

Deft Patrick Sherry + (atty Mary J. McDonald present) With draws his plea of Not Guilty.

and Pleads Guilty to counts 1 and 2. Pre-Sentence Report ordered. Sentence adjourned without date at this time or at the conclusion of the Trial. Bail cont'd at \$100,000 secured by \$35,000 cash. Carter, J.

MAY 7 1975

Deft Julius Celentano Jr (atty Robert Blossner present) Pleads Not Guilty. Bail fixed by Magistrate in the sum of \$50,000 P.R.B. secured by \$5,000 cash. Bail limits extended to E.D.N.Y. + New Jersey is continued. Carter, J.

MAY 7 1975

Suppression Hearing begun as to Deft Julius Celentano only, and concluded. Motion to suppress is denied.

MAY 7 1975

Trial begun as to Deft Richard Hauptner

5017(c). Imposition of sentence is hereby suspended and the deft is place on probation for a period of Eighteen (18) Months subject to the standing probation order of this court. A Special condition of probation being that in the event of a violation the deft is to serve the sentence which was previously suspended by this court. *N Carter, J*

UL 3-1975 DEFENDANT Richard Hauptner *It is adjudged*
+ (Atty Robert Levy present)
that the deft is hereby committed to the custody of the Atty General or his authorized Rep for imprisonment for a period of 5 years on counts 5 years on count 2, 7 years on count 3, and 7 years on counts 4, 5 + 6, to run concurrent with each other. Deft Remanded. *N Carter, J*

July 3, 1975 Deft Richard Hauptner + (Atty Robert Levy present) on application to fix bail pending appeal. Application Denied after a in camera hearing. *N Carter, J*

July 10, 1975 - Defendant Patrick Sherry
(Atty: Mary G. McDonald)

On cts. 1 + 2, (Atty: Barbara Ambler)

→ Deft. Sentenced as a young adult offender pursuant to T-18 Sec. 5010(c) as amended by Senate Section 4209. The Court recommends that the deft. be incarcerated for a period not to exceed 6 months. Deft. is released on his own recognizance to July 17, 1975 or 10 AM at which time he is to surrender

to the custody of the U.S. Marshal to
commence service of sentence.

Open counts three (3) through six (6) are
dismissed with consent of the Government:

JS

Carter J.

Julius Celentano with a jury.

1975 Trial continued
1975 Trial continued
1975 Trial continued

1975 Trial continued & Trial concluded. Jury Verdict

NDANT Julius Celentano Jr. DEFENDANT Richard Hauptner

-1 Guilty	Count 1 Guilty
-2 Guilty	Count 2 Guilty
-3 Not Guilty	Count 3 Guilty
-4 Not Guilty	Count 4 Guilty
-5 Not Guilty	Count 5 Guilty
-6 Not Guilty	Count 6 Guilty

Reordered. Sentences adjourned to June 16, 1975
10 AM in courtroom 36. Bail cont'd as to both
NDANT'S. Carter

1975 DEFENDANT Julius Celentano Jr. (Atty Robert Blosser
sent) It is adjudged that the deft is hereby committed
to the custody of the Atty General or his authorized
as a Young Adult Offender pursuant to Title 18,
U.S. Code, Sec 5010(b) for treatment and supervision
extended by Title 18, U.S. Code, Sec 4209 until
charged by the Federal Youth Correction
Commission of the Board of Parole as provided in title
U.S. Code Sec 5017(c). On defendant's counsel's
motion the open indictments are dismissed
1118 and 74cr 1171, with the consent of the Govt.
& pending appeal is fixed at \$50,000 P.R.B.
and by \$5,000 cash bail limits are E.D.N.Y. N.J.
S.D.N.Y. Carter

975 DEFENDANT Richard Hauptner (Atty Robert Levy
sent) Moves by a motion for a new trial. Govt
to reply papers by June 20, 1975 a hearing then
to be held if the court determines that the
motion has some merit. Sentence adjourned to June
1975 at 10 A.M. DEFENDANT Patrick Sherry sentence
also adjourned without date. Carter

1975

DEFENDANT

Julius

(attorney Robert
soner present) It is adjudged that the deft
erely committed to the custody of the atty
eral or his authorized rep as a Young Adult
gender pursuant to Title 18 U.S. Code Sec 5010(b)
treatment + supervision as extended by Title
18 U.S. Code Sec 4209 until discharged by the Federal
with Correction Division of the Board of
ole as provided in Title 18 U.S. Code Section

JUL 17 1975

Deft Patrick Sherry surrender
d adjourned to July 21, 1975

M. Carter

5 THE COURT: Ladies and gentlemen, we now come to
6 that part of the case where the evidence is in, the lawyers
7 have presented their arguments and you are about to exercise
8 your final role, which is to pass upon and decide the fact
9 issues that are in the case.

10 You are the sole and exclusive judge of the facts.
11 You pass upon the weight of the evidence, you determine the
12 credibility of witnesses, you resolve such conflicts as there
13 may be in the evidence and you draw such reasonable infer-
14 ences as may be warranted by the testimony or exhibits in
15 the case.

16 My function at this point is to instruct you as to
17 the law that is applicable to the case. It is your duty to
18 accept the law as I give it to you in these instructions
19 and to apply it to the facts as you find them. The logical
20 result of that application is your verdict in the case.

21 With respect to any fact matter, it is your
22 recollection and yours alone that governs. Anything that
23 counsel either for the government or the defense may have said
24 with respect to matters in evidence during the trial, in
25 questions, in colloquy with the Court, in argument or in

1 gt/lf/215

2 summation is not to be substituted for your own recollection
3 of the evidence.

4 So, too, anything the Court may have said during
5 the trial or may refer to during the course of these instructions
6 as to any factual matter in evidence is not to be taken in
7 lieu of your own recollection. The case must be decided by
8 you upon the sworn testimony of the witnesses and such
9 exhibits as were received in evidence and any stipulations
10 entered into among counsel.

11 At times throughout this trial I have been
12 called upon to make rulings upon various matters of law,
13 as when a question was put to a witness was objected to,
14 or after a question was answered a motion was made to strike
15 the answer, or the offer of a document was objected to.

16 I have sustained some objections and I have
17 overruled others. It is essential in the performance of
18 your duty that when anything was ordered stricken from the
19 record or rejected you put it out of your mind and disregard
20 it. Similarly, if a question was asked and an objection to
21 that question was sustained and no answer was given, the
22 question itself should play no part in your consideration
23 of the case.

24 Please do not concern yourselves with any reasons
25 for any of these rulings, they are purely legal matters.

1 gt/lf/216

2 Conferences at the bench were conducted at the
3 request of the attorneys. As I think I have advised you,
4 these conferences were solely on questions of law and are of
5 no concern to you. You are not to draw any inferences
6 against either side because of requests for such conferences
7 or because such request may have been denied.

8 In deciding this case, you will be called upon
9 to consider both direct and circumstantial evidence. It
10 is well to explain now the difference between these two
11 types of evidence.

12 Direct evidence is where a witness or participant
13 testified as to what he saw, heard or observed, what he
14 knows of his own knowledge, something which comes to him by
15 virtue of his senses. A document can also contain direct
16 evidence.

17 Circumstantial evidence is evidence of facts
18 and circumstances from which one may infer connected
19 facts which reasonably flow in the common experience of
20 mankind.

21 Stated somewhat differently, circumstantial
22 evidence is evidence of facts from which other facts that
23 are material in a lawsuit may be found by a process of inference.

24 Let me give you an example that I believe has
25 nothing whatever to do with the facts in this case.

Suppose you had a material issue in some case as to whether John Doe was drinking alcoholic beverages on a particular night. A witness might take the stand and testify that he had given whiskey to John Doe and seen him drinking it. That would be so-called direct evidence. If you believed the witness and thought he was able to record accurately, you could find from that direct evidence that John Doe had been drinking on the night in question.

Then you might have a witness testify that he had seen John Doe enter a tavern and then had seen him leave the tavern a few hours later walking and talking in ways that that frankly suggested he was drunk. If you believed that witness and thought he was an accurate reporter, you could find on the basis of that testimony that John Doe had been drinking on the night in question and that would be circumstantial evidence of that material fact in this hypothetical case.

Let me tell you that for your purposes, there is no general rule of law, no general rule of good sense that makes either of these two types of evidence, direct or circumstantial, in a general way on any higher or lower or different footing from the other.

With respect to any evidence admitted into a trial record, whether it is direct or circumstantial, it is

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2 entitled to such weight and you are permitted to draw such
3 reasonable inference as your good judgment dictates in a
4 particular case.

5 The weight and effect of any item or category
6 of evidence depends not on whether it is to be characterized
7 as direct or circumstantial, but on the concrete significance
8 of that particular piece of evidence in its trial setting
9 and upon its intrinsic credibility and persuasive power
10 in the light of your observation of the witnesses, your
11 general experience of things and your reasonable analysis
12 of the whole record.

13 There are times when different inferences may
14 be drawn from facts, whether they are proved by direct or
15 circumstantial evidence. The government asks you to draw one
16 set of inferences, while the defendants ask you to draw
17 another. It is for you to decide and for you alone what
18 inferences you will draw.

19 It is your function to determine the truth or
20 falsity of the testimony of each witness. No inference
21 as to the credibility of any witness should be drawn from
22 the fact that upon occasion I have asked questions of a wit-
23 ness. My questions were only intended to clarify or to ex-
24 pedite matters. They were not intended to suggest any opinion
25 as to the credibility of a witness who appeared before you.

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2 Now, how do you determine the truth and how do
3 you appraise the credibility of witnesses?

4 I think when you were sworn in I told you that
5 you use your own common sense, and I repeat it.

6 The degree of credit to be given to a witness
7 should be determined by his or her demeanor, his or her
8 relationship to the controversy and to the parties, his or
9 her bias or impartiality, the reasonableness of his state-
10 ments, the strength or weakness of his recollection viewed
11 in the light of all the other testimony and the attendant
12 circumstances in the case.

13 Now, you observed the witnesses. You heard their
14 testimony. How did they strike you? Did their answers seem
15 frank, open, truthful, candid? Or were they equivocal,
16 deliberately confusing or evasive? Or were they somewhere
17 in between? How did each witness impress you?

18 And so you take each one and on the basis of your
19 common sense and everyday experience you determine whether
20 or not you believe the witnesses and to what extent you be-
21 lieve them.

22 In passing upon the credibility of a witness, you
23 may also take into account whether there were material inconsis-
24 tencies or contradictions within his or her own testimony, whether
25 a witness changed his or her testimony, the extent to which he

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2 or she has been corroborated or contradicted by other credible
3 evidence.

4 The testimony of a witness may fail to conform
5 to the facts as they occurred because the witness is inten-
6 tionally telling a falsehood or because the witness did not
7 accurately observe the events about which he testified or
8 because his recollection of what happened is at fault, or
9 even because he has not expressed himself clearly in giving
10 his testimony.

11 If in your consideration of the evidence there
12 appears to be differing versions of the facts, you will have
13 to determine whether the apparent discrepancy in the evidence
14 results from an understandable error which can be reconciled
15 so that both stories fall together rationally. If, however,
16 you find this is not appropriate or possible, you will then
17 have to decide which version you will accept. You may
18 accept so much of the testimony of a witness as you may deem
19 true and disregard the rest. You are at liberty, if you deem
20 it appropriate, to disbelieve the testimony in whole or in
21 part even though it is not otherwise contradicted or impeached.

22 An interested witness is not necessarily unworthy
23 of belief. It is a factor, however, which you may consider in
24 determining the weight and credibility to be given to the
25 witness' testimony.

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2 If you find that any witness has testified
3 falsely to any material fact, you may disregard all of his
4 testimony or accept such part of it as you believe worthy
5 of belief as it appeals to your judgment and your condition.

6 A witness may be discredited by contradictory
7 evidence or by evidence that at other times the witness
8 has made statements which are inconsistent with his or
9 her testimony here. If you believe that any witness has
10 been discredited in this manner, you may give the testimony
11 of that witness whatever credibility, if any, you think
12 it deserves.

13 Now, the fact that the government is a party here,
14 that the prosecution is brought in the name of the United
15 States Government, entitles it to no greater consideration
16 than that accorded to any other party in this litigation.
17 By the same token, it is entitled to no less consideration.
18 The case should be considered by you as an action between
19 persons of equal standing in the community. All persons
20 stand equal before the law and are to be dealt with as
21 equals in a court of justice.

22 As I advised you at the start of this trial,
23 an indictment is merely an accusation, a charge. It is
24 not evidence or proof of a defendant's guilt and no inference
25 of any kind may be drawn from the indictment.

The government has the burden of proving the charges against each defendant beyond a reasonable doubt. It is a burden that never shifts and remains upon the government throughout the entire trial. A defendant does not have to prove his innocence; on the contrary, he is presumed to be innocent of the accusation contained in the indictment. That presumption of innocence was in his favor at the start of the trial, continued in his favor throughout the trial, is in his favor even as I instruct you now, and it remains in his favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

What is a reasonable doubt?

It is a doubt based on reason which arrives from the evidence or lack of evidence in the case. It is a doubt that a reasonable man or woman might entertain.

It is not a fanciful or speculative doubt. It is not a mangled doubt. It is not a doubt that a juror might conjure up in order to avoid performing an unpleasant task or duty. It is not proof to an absolute certainty.

Let me repeat, it is a reasonable doubt. It is a doubt that appeals to your reason, to your judgment, your common understanding and your common sense, a doubt that would

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2 cause you to hesitate to act in matters of importance in your
3 daily lives.

4 On the other hand, the government does not have
5 to prove the guilt of the defendant beyond all possible doubt
6 or to a positive certainty. If that were the rule, few
7 people, however guilty they might be, would be convicted.

8 If when you consider the evidence in this case
9 you have a reasonable doubt that the government has proved
10 any element of the crime charged, then you must return a
11 verdict of acquittal. You may not return a guilty verdict
12 simply because you feel that it is more likely than not that
13 the defendant committed the crime charged. A guilty verdict
14 is appropriate only if each and every one of you are satisfied
15 that the defendant's guilt has been proved beyond a reasonable
16 doubt.

17 The indictment in this case contains six counts
18 or accusations. Each of these six counts charges a separate
19 offense or crime. Each must be considered separately.

20 The indictment names three defendants, Patrick
21 Sherry, Julius Celentano and Richard Hauptner. Only two of
22 these defendants, Julius Celentano and Richard Hauptner, are
23 on trial before you. Hauptner and Celentano are the only
24 persons whose guilt or innocence you must announce in your
25 verdict, although as I will explain to you shortly in consider

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2 ing their guilt or innocence you may have to determine the
3 nature of the participation, if any, of Patrick Sherry.

4 In your determination of guilt or innocence, you
5 must bear in mind that guilt is personal. The guilt or
6 innocence of the defendants on trial before you must be
7 determined separately with respect to each of them solely on
8 the evidence presented, or the lack of evidence, with respect
9 to each of them.

10 The defendant Patrick Sherry is not on trial here.
11 He has entered a plea of guilty in this case. That plea is
12 his personal statement of guilt. It is not an indication
13 that the other defendants on trial are guilty and you are not
14 to consider his plea as evidence against them.

15 In this case, the indictment charges a number
16 of different crimes against one or both of the two defendants.
17 It is your obligation to consider separately each of the
18 individual charges or counts of the indictment and to decide
19 whether as to each count the government has or has not
20 sustained its burden of proving beyond a reasonable doubt
21 the guilt of each defendant named in that particular count.

22 Let me summarize the six counts in the indictment.

23 Count one charges Patrick Sherry, Julius Celentano
24 and Richard Hauptner, the defendants, with a conspiracy to
25 engage in the business of dealing in hand guns, dealing in

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2 sawed-off weapons and the possession of firearms.

3 As I told you, Patrick Sherry is not on trial
4 and you are not to reach any verdict as to him.

5 Count two charges the three defendants with
6 unlawfully dealing in firearms, namely, hand guns, without
7 a license as required by law.

8 Count three charges the three defendants with
9 unlawfully dealing in other firearms, namely, sawed-off
10 weapons and a silencer, when they had not paid the special
11 occupational tax or registered as required by law.

12 Counts four, five and six charge each of the de-
13 fendants with unlawfully possessing three different firearms
14 which were not registered to any of them in the National
15 Firearms Registration and Transfer Record.

16 In each of the counts numbered two to six, Hauptner
17 and Celentano are also charged with aiding and abetting
18 others in committing the underlying crime charged in that
19 count.

20 A conspiracy to commit a crime is entirely
21 separate and distinct from the substantive crime which is the
22 object of the conspiracy.

23 In order to find the defendant guilty of conspiracy,
24 there is no need to prove an actual violation of the laws
25 relating to possession and dealing in weapons. Since the

essential elements which the government must prove before a conviction may be had on any of the substantive counts two to six are different from the essential elements of the crime of conspiracy, we shall consider each separately. I believe it will be somewhat clearer for you if we discuss the substantive counts two to six first, then we will consider the conspiracy count.

Turning first to count two of the indictment, this count charges Hauptner and Celentano with engaging in the business of dealing in firearms without a license as required by law.

Count two charges that Hauptner and Celentano violated Section 922 (a) 1 of Title 18 of the United States Code. That section provides in pertinent part as follows:

"It shall be unlawful for any person, except a licensed importer, licensed manufacturer or licensed dealer, to engage in the business of importing, manufacturing or dealing in firearms or ammunition."

With respect to the charge of aiding and abetting in count two and the other substantive counts, Section 2 of Title 18, United States Code, provides in pertinent part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures

2 its commission is punishable as a principal."

3 I shall explain certain terms as they are used
4 in these statutes in the indictment, but first let me read
5 count two of the indictment to you.

6 "From in or about June, 1974, up to and including
7 the 26th day of November, 1974, in the Southern District of
8 New York, Patrick Sherry, Julius Celentano, Jr., and Richard
9 Hauptner, the defendants, unlawfully, willfully and knowingly
10 did engage in the business of dealing in firearms, including
11 those specified below, at a time when the said defendants
12 were not licensed importers, licensed manufacturers or
13 licensed dealers."

14 Below is a description of the various weapons and
15 it reads as follows:

16 On the quantity, description and manufacturer's
17 stamp, quantity 44, the .2 caliber derringers without serial
18 numbers, manufacturer's stamp none.

19 Quantity 34, .22 caliber revolvers without
20 serial numbers, manufacturer's stamp C.D.M. Products, Inc.,
21 New York, New York.

22 Quantity 21, description .25 caliber automatic
23 pistols without serial numbers, manufacturer's stamp Valor
24 Import Corporation, C.D.M., Hialeah, Florida.

25 Quantity 14, .22 caliber derringers without serial

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2 numbers, manufacturer's stamp C.D.M. Products, Inc., New
3 York, New York.

4 Quantity 7, .25 caliber automatic pistols without
5 serial numbers, manufacturer's stamp Valor Corporation.

6 Quantity 5, .25 automatic pistols without serial
7 numbers, manufacturer's stamp Galesi, Florida Firearms
8 Corporation, Miami, Florida.

9 Quantity 2, .22 caliber derringers without serial
10 numbers, manufacturer's stamp Firearms International Corpora-
11 tion, Washington, D.C.

12 Quantity 1, .38 caliber revolver, serial number
13 K322373, manufacturer's stamp Smith and Wesson.

14 Quantity, 1 - .25 automatic pistol, serial
15 number 008239, manufacturer's stamp R.G. Industries, Miami,
16 Florida.

17 Quantity 1, .25 caliber automatic pistol, serial
18 number 23174, manufacturer's stamp Valor Arms.

19 Before you may find either Hauptner or Celentano
20 guilty of the crime charged in count 2, you must be convinced
21 that as to the particular defendant, the government has
22 proved each of the following elements beyond a reasonable
23 doubt.

24 First, that in or about June, 1974, and continuing
25 until November, 1974, the defendant whose guilt or innocence

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2 you are considering engaged in the business of dealing in
3 firearms.

4 Second, that the particular defendant did not
5 have a license as an importer, manufacturer or dealer.

6 Third, that in engaging in the business of dealing
7 in firearms without a license, the particular defendant
8 acted knowingly and willfully.

9 Let me say a few more words on each of these
10 elements.

11 You will recall that the first element of the
12 offense is to engage in the business of dealing in firearms.
13 You may ask yourself, what does that phrase mean?

14 The word "firearms" as used in count 2 means
15 any weapon which will or is designed to or may readily be
16 converted to expel a projectile by the action of an explosive.

17 The term "dealer" as used in this indictment
18 means any person engaged in the business of selling firearms
19 or ammunition at wholesale or retail. A "business" is that
20 which occupies time, attention and labor for the purpose of
21 livelihood or profit.

22 In order for the government to prove that a
23 particular defendant was engaged in the business of dealing
24 in firearms, it is not sufficient for the government to prove
25 that the defendant was involved in a single transaction involv-

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2 ing the sale of a firearm. However, such a transaction
3 may be considered by you along with the other evidence of
4 whether this activity was a continuing one.

5 It is not a necessary element of the crime that
6 the particular defendant's only business be that of selling
7 firearms nor need it be a significant source of income for
8 him.

9 With respect to the second element, the government
10 and the defendants have stipulated that a government employee,
11 if called as a witness, would testify that she is a custodian
12 of the relevant records and that a diligent search failed to
13 show that either of the defendants or Patrick Sherry had a
14 license to import, manufacture or deal in firearms. Thus, you
15 must accept the second element of count 2 as established.

16 As to the third element, that the defendant you
17 are considering acted willfully and knowingly, I direct your
18 attention to the terms "knowing and willful."

19 You must keep these definitions in mind throughout
20 this charge and in your deliberations, since they apply in
21 connection with the other substantive counts and the conspiracy
22 count as well.

23 Taking the definition of knowingly first, and act
24 is done knowingly if it is done voluntarily and purposefully and
25 not because of mistake, inadvertence or other innocent reason.

An act is willful if it is done knowingly, deliberately and with an evil purpose. An act is not done willfully if it is done as a result of a mistake, carelessness, lack of an evil purpose or motive or for some other innocent reason.

It is not necessary for you to know that a defendant knew he was breaking a particular law and whether or not an act is knowing or willful has nothing to do with the defendant's personal or private reasons for committing the act, so long as the act is done with an evil purpose.

Knowledge, willfulness and intent exist in the mind, and since it is not possible to look into a man's mind to see what went on, the only way you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge, willfulness and intent were present at the time in question.

In making this determination you should presume that a person intends the natural and probable consequences of his acts. It is not necessary for the government to show that a particular defendant physically committed the crime itself. I have already read to you Section 2 of Title 18 of the United States Code and I will repeat it:

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2 "Whoever commits an offense against the United
3 States or aids, abets, counsels, commands, induces or procures
4 its commission, is punishable as a principal."

5 Thus, a person who aids and abets another to
6 commit an offense is just as guilty of that offense as he
7 would be had he committed it himself.

8 Before you can conclude that a person aided and
9 abetted, you must first find that the substantive crime
10 charged, in the case of count 2, engaging in the business
11 of dealing in firearms, was, in fact, committed.

12 Secondly, you must determine that the defendant
13 you are considering in some way associated himself with the
14 criminal venture, that he participated in it as something
15 he wished to bring about and that by his actions he tried to
16 make the crime successful. You must find more than the defen-
17 dant's mere presence during or knowledge of the offense.

18 The one who aids or abets another in the commission
19 of a crime is equally guilty with the person who actually
20 physically commits it. Accordingly, if you find in count 2
21 beyond a reasonable doubt that any of the three defendants
22 charged therein committed the offense charged and that either
23 of the defendants on trial aided and abetted him, then you
24 may find that defendant on trial guilty of the offense
25 of count 2.

You must keep these instructions on aiding and abetting in mind throughout your deliberations, since they also apply in respect to counts 3, 4, 5 and 6, where the defendants are also charged with aiding and abetting.

Let us turn now to count 3, which charges Sherry, Celentano and Hauptner with dealing in other firearms, namely, sawed-off weapons and a silencer, when they had not paid the special occupation tax or registered as required by law. This count alleges that each of the defendants violated Section 5861 (a) of Title 26, United States Code, which provides in part as follows:

"It shall be unlawful for any person to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special occupational tax required by Section 5801 for his business or having registered as required by Section 5802."

Let me read count 3 to you.

"From on or about the third day of September, 1974, up to and including the 6th day of October, 1974, in the Southern District of New York, Patrick Sherry, Julius Celentano and Richard Hauptner, the defendants, unlawfully, willfully and knowingly did engage in business as dealers in firearms, as defined in Title 26, United States Code, Section 5845, to wit, a Universal M-1 carbine, serial

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 2 number 208760, with a barrel length of 11-1/8 inches and an
 3 overall length of 21-1/4 inches, a silencer for said firearm,
 4 said silencer being 10-1/2 inches long and 1-1/2 inches in
 5 diameter, and a Terne rifle 7.65 millimeter, barrel length
 6 of 9 inches and an overall length of 20-5/8 inches, with
 7 serial number E2158, without having paid the special occupational
 8 tax imposed on such business by Section 5801, Title 26,
 9 United States Code, and without having registered with the
 10 Secretary of the Treasury or his delegate pursuant to Section
 11 5802, Title 26, United States Code."

12 Before you may find either Celentano or Hauptner
 13 guilty of the offense charged in count 3, you must be con-
 14 vinced that as to that particular defendant the government has
 15 established each of the following elements beyond a reasonable
 16 doubt.

17 First, that the defendant you are considering
 18 engaged in the business of dealing in firearms as that term
 19 is defined in the statute.

20 Second, that the particular defendant did not pay
 21 the special occupational tax and that he did not register with
 22 the Secretary of the Treasury.

23 And, finally, that the particular defendant acted
 24 or failed to act knowingly and willfully.

25 I shall now go into these elements in more detail.

As I said, the first element is that the defendant must be found to have engaged in the business of dealing in firearms.

I have also explained to you the phrase "engaged in the business of dealing" in connection with count 2 and you should apply that instruction here.

The meaning of the term "firearm" as used in count 3 is, however, different from its meaning in count 2 because there is a difference in the statutory definition.

As used in count 3 and in counts 4, 5 and 6, the term "firearm" is defined to include a weapon made from a rifle having a barrel or barrels of less than sixteen inches in length and a muffler or silencer for any firearm.

As you heard, the parties entered into a stipulation on this point and there is no dispute in this case that the sawed-off rifles and silencer mentioned in counts 3, 4, 5 and 6 are firearms within the meaning of the statute.

As to the second element, the government and the defendants have stipulated that neither the defendant or Patrick Sherry either paid the special occupational tax or registered under the statute. Therefore, you must take the second element as established.

With respect to the third element, that the defen-

dant acted or failed to act knowingly or willfully, I have already explained to you the meaning of "knowledge" and "willfulness" and I told you how you are to determine whether the requisite knowledge and willfulness were present at the time in question.

Finally, I want to remind you that each of the defendants is charged not only with the underlying offense charged in count 3, but with aiding and abetting the others. I have already read to you the statute on aiding and abetting and explained the elements thereof. You are to apply these instructions with respect to count 3.

Let us now turn to counts 4, 5 and 6, which charge each of the defendants with unlawfully possessing three different firearms which were not registered to any of the defendants in the National Firearms Registration and Transfer Record.

These counts charge the defendants with violating Section 5861 (d) of Title 26, United States Code, which provides in pertinent part as follows:

"It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Now let me read to you counts 4, 5 and 6.

Count 4 reads as follows:

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2 "On or about the 3rd day of September, 1974,
3 in the Southern District of New York, Patrick Sherry, Julius
4 Celentano and Richard Hauptner, the defendants, did unlawfully,
5 willfully and knowingly possess a firearm as defined in Title
6 26, United States Code, Section 5845, to wit, a Universal
7 M-1 carbine, serial number 208760, with a barrel length of
8 11-1/8 inches and an overall length of 21-1/4 inches, which
9 was not registered to any of them in the National Firearms
10 Registration and Transfer Record."

11 Count 5 reads the same, but indicates that the
12 firearm in question is a silencer for a firearm, said silencer
13 being 10-1/2 inches long and 1-1/2 inches in diameter, which
14 was not registered to any of them in the National Firearms
15 Registration and Transfer Record.

16 Count 6 refers to the firearm in question as a
17 Terne rifle, 7.65 millimeter, a barrel length of 9 inches
18 and an overall length of 20-5/8 inches with serial number
19 E2158, which was not registered to any of them in the
20 National Firearms Registration and Transfer Record.

21 To find either of the defendants guilty of the
22 crimes charged in any of these three counts, you must be
23 convinced as to that particular defendant that the govern-
24 ment has proved each of the following elements beyond a reason-
25 able doubt.

1 gt/lf/238
2 First, you must find that the defendant received
3 or possessed the firearm as defined in the statute.

4 Second, that the firearm in question is not
5 registered to the defendants in the National Firearms
6 Registration and Transfer Record.

7 And, third, that the defendant acted or failed
8 to act knowingly and willfully.

9 As to the first element, the defendant received
10 or possessed a firearm, I have already explained that for
11 the purposes of counts 4, 5 and 6 a firearm includes a weapon
12 made from a rifle having a barrel or barrels of less than
13 16 inches in length and a muffler or silencer for any firearm.

14 As I told you before, the parties have stipulated
15 that the weapons mentioned in counts 4, 5 and 6 are firearms
16 within the meaning of the statute.

17 The term "to receive" is to be given its ordinary
18 meaning.

19 As to the term "possessing," the law recognizes
20 two kinds of possession, actual and constructive possession.

21 A person who knowingly has direct, physical con-
22 trol over a thing at a given time is then in actual possession
23 of it.

24 A person who, although not in actual possession,
25 knowingly has both the power and intention at a given time

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2 to exercise dominion or control over a thing either directly
3 or through another person or persons is then in constructive
4 possession of it.

5 As to the second element, the government and the
6 defendants have again stipulated that the guns referred to
7 in counts 4, 5 and 6 were never registered to either of the
8 defendants or to Patrick Sherry in the National Firearms and
9 Registration and Transfer Record. Thus, you must accept the
10 second element as established.

11 As to the third element, that the defendant acted
12 willfully and knowingly, I have, again, explained to you the
13 meaning of that and told you how you are to determine whether
14 the requisite knowledge, intent and willfulness were present.

15 Finally, you must remember in connection with
16 counts 4, 5 and 6 that Celentano and Hauptner are charged
17 with aiding and abetting and you must apply the instructions
18 as to aiding and abetting that I have already given to you.

19 As I told you, you must give separate consideration
20 to these three counts and render a separate verdict as to each
21 count.

22 Count 1 of the indictment charges Sherry, Celentano
23 and Hauptner with conspiracy to commit the three offenses we
24 have discussed in connection with the substantive counts;
25 that is, Sherry, Celentano and Hauptner are charged with a

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2 conspiracy to engage in the business of dealing in firearms,
3 namely, hand guns, without being licensed to do so; to engage
4 in the business of dealing in firearms, namely, sawed-off weapons
5 and a silencer, without having paid the special occupational
6 tax or having registered as required by law; and to possess
7 firearms which were not registered to any of them in the
8 National Firearms Registration and Transfer Record.

9 Count 1 charges that each of the defendants'
10 conduct violated Section 371 of Title 18, United States Code,
11 which provides in pertinent part as follows:

12 "If two or more persons conspire either to commit
13 any offense against the United States, or to defraud the
14 United States, or any agency thereof, in any manner or for
15 any purpose, and one or more of such persons does any act
16 to effect the object of the conspiracy, each is guilty of
17 a crime."

18 Let me read count 1 to you.

19 "From in or about June, 1974, up to and including
20 the date of the filing of this indictment, which is January
21 30, 1975, in the Southern District of New York, Patrick
22 Sherry, Julius Celentano and Richard Hauptner, the defendants,
23 unlawfully, willfully and knowingly did combine, conspire,
24 confederate and agree together and with each other and with
25 other persons known and unknown to the Grand Jury, to commit

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2 offenses against the United States, to wit, to violate Section
3 922 (a) (1) of Title 18, United State Code, and Sections 5861
4 (a) and (b) of Title 26, United States Code.

5 "Two. It was part of said conspiracy that the
6 said defendants would engage in the business of dealing
7 in firearms at a time when the said defendants were not
8 licensed importers, licensed manufacturers or licensed
9 dealers, in violation of Title 18, United States Code, Section
10 922 (a) (1).

11 "Three. It was further part of said conspiracy
12 that the said defendants would engage in the business as
13 dealers in firearms as defined in Title 26, United States
14 Code, Section 5845, without having paid the special occupational
15 tax imposed on such business by Section 5801, Title 26, United
16 States Code, and without having registered with the Secretary
17 of the Treasury or his delegate pursuant to Section 5802,
18 Title 26, United States Code, all in violation of Section
19 5861 (a) of Title 26.

20 "Four. It was a further part of said conspiracy
21 that the said defendants would possess firearms as defined
22 in Title 26, United States Code, Section 5845, to wit, a
23 Universal M-1 carbine, a silencer for said carbine, and a
24 sawed-off rifle, which were not registered to any of them in
25 the National Firearms Registration and Transfer Record, in

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2 violation of Title 26, United States Code, Section 5861 (d).

3 "Five. Among the means by which the said defen-
4 dants would and did carry out their agreed upon unlawful
5 purposes were the following:

6 "A. The defendant Richard Hauptner would and
7 did supply the defendants Patrick Sherry and Julius Celentano,
8 Jr., with both assembled and unassembled parts for .22 caliber
9 derringers, .22 caliber revolvers and .25 caliber automatic
10 pistols.

11 "B. The defendant Patrick Sherry would and
12 did then store said hand guns and assemble said parts into
13 hand guns in his home.

14 "C. The defendant Patrick Sherry and
15 Julius Celentano would and then did sell said hand guns.

16 "D. The defendant Richard Hauptner would and
17 did cut down weapons and fit them with silencers for their
18 sale by the defendant Patrick Sherry.

19 "Overt Acts.

20 "In furtherance of said conspiracy and to effect
21 the objectives thereof, the following overt acts, among
22 others, were committed by the defendants in the Southern District
23 of New York:

24 "1. On or about August 4, 1974, the defendants
25 Patrick Sherry and Julius Celentano met at the Baychester

Diner, Bronx, New York, to discuss the sale of hand guns.

"2. On or about September 3, 1974, the defendant Richard Hauptner supplied defendant Patrick Sherry with a silencer for a M-1 carbine.

"3. On or about September 11, 1974, the defendants Patrick Sherry and Julius Celentano sold twelve, .22 caliber derringers and fifteen, .22 caliber revolvers, at the home of the defendant Patrick Sherry in City Island, Bronx, New York.

"4. On or about November 26, 1974, the defendant Richard Hauptner supplied defendant Patrick Sherry with four .25 caliber automatic pistols and two .22 caliber revolvers at the home of the defendant Richard Hauptner, in City Island, Bronx, New York."

In order to find any of the defendants guilty of a conspiracy as charged in count 1, you must be satisfied that the government has proved the following elements beyond a reasonable doubt:

First, you must find the existence of a conspiracy charged in count 1. In this regard, you must find that sometime between June of 1974 and the date of the filing of this indictment in January of 1975, an agreement existed between any two or more of the defendants named in the indictment to engage in the business of dealing in hand guns without a

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2 license to do so, to engage in the business of dealing in
3 sawed-off weapons without paying the special occupational
4 tax or registering or to possess unregistered firearms.

5 In this regard you need not find that the conspiracy
6 existed for the entire time mentioned in the indictment or
7 that the agreement was to accomplish all the objectives
8 listed in the indictment, it is sufficient if it is shown
9 that the agreement existed for any part of the time alleged
10 and that its purpose was either to engage in the business of
11 dealing in hand guns without a license, to engage in the
12 business of dealing in sawed-off weapons without paying the
13 occupational tax and without registering or to possess
14 unregistered firearms.

15 Also as I shall explain to you in further detail
16 later, you need not find that all the persons whom the govern-
17 ment alleges were co-conspirators reached an agreement. An
18 agreement between any two of the defendants or between any
19 one defendant and another alleged co-conspirator is sufficient.

20 Second, you must find beyond a reasonable doubt
21 that the defendant whose guilt or innocence you are consider-
22 ing knowingly and willfully became a participant in the con-
23 spiracy with knowledge of its alleged criminal purpose.

24 Third, that at least one of the alleged conspirators,
25 not necessarily the defendant you are considering, knowingly

committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

If the government fails to establish each of these three elements as to any of the defendants beyond a reasonable doubt, you must acquit the defendant or defendants as to whom the government has failed to establish any element of this count.

If it succeeds as to a particular defendant, your duty is to convict that defendant on this count.

As I have informed you, the first of the elements which you must find that the government has proved beyond a reasonable doubt is that the conspiracy charged in the indictment existed.

First, I want to discuss with you what the term "conspiracy" means, because the term used here is used in a legal context and, therefore, has a somewhat different meaning than it has when it is used colloquially.

A conspiracy is a combination or an agreement of two or more persons to accomplish a criminal or unlawful purpose. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law.

Whether or not the defendants finally accomplished what it is alleged they conspired to do is immaterial; that is to say, the government is not obliged to prove that a purpose

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2 of the conspiracy was attained.

3 It has often been said that a conspiracy is a
4 partnership in crime in which each member becomes the agent
5 of each other member.

6 To establish a conspiracy, however, the government
7 is not required to show that the alleged conspirators sat
8 around a table and entered into a solemn compact, orally
9 or in writing, stating they have formed a conspiracy to vio-
10 late the law and setting forth details of their plans. It
11 is sufficient if two or more persons in any manner, through
12 any contrivance, impliedly or tacitly, come to a common
13 understanding to violate the law. Express language or
14 specific words are not required to indicate assent or attach-
15 ment to a conspiracy.

16 On the other hand, mere similarity of conduct
17 among various persons and the fact that they may have
18 associated with each other and may have assembled together
19 and discussed common aims and interests does not necessarily
20 establish proof of the existence of a conspiracy.

21 If upon consideration of all the evidence, direct
22 and circumstantial, testimonial and documentary, you find
23 beyond a reasonable doubt that the minds of at least two
24 of the alleged conspirators met in an understanding way and
25 that they agreed as I have explained a conspiratorial agreement

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to you to work together in furtherance of their unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy is satisfied.

If you find that a conspiracy existed beyond a reasonable doubt, then you must consider the second element of the conspiracy count, that is, whether the government has established beyond a reasonable doubt that the defendant whose guilt or innocence you are considering knowingly and willfully became a participant in the conspiracy with knowledge of its alleged criminal purpose.

You may not assume that a defendant joined a conspiracy simply because you are convinced that he knew or was associated or had other dealings with other people who conspired to violate the law.

I charge you that mere association, even close and repeated association, with some other alleged member of the conspiracy is not sufficient in and of itself to support a finding that a defendant was a member of the alleged conspiracy.

In addition, I instruct you that none of the following is sufficient in and of itself to support a finding that a defendant was a member of an alleged conspiracy:

Mere attendance at a meeting with co-conspirators, mere presence at the scene of the crime or mere knowledge

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2 of conspiratorial acts or objectives.

3 The mere fact that two persons are on trial
4 together cannot be considered in any way as indicating that
5 they participated in a conspiracy to violate the law.

6 All of the conspirators need not be acquainted
7 with each other. They may not have previously associated
8 together. One of the defendants may know only one other member
9 of the conspiracy. But if he enters into an unlawful
10 agreement with that other member of the conspiracy, he
11 becomes a party thereto.

12 To conclude that a defendant was a member of a
13 conspiracy, you must find that he knew the unlawful purpose
14 of the alleged conspiracy, that knowing the purpose he inten-
15 tionally joined in the endeavor and that he had an interest
16 in making it succeed.

17 It is not necessary, however, that you find that
18 each conspirator was fully informed as to the details or the
19 full scope of the conspiracy or participated in every aspect
20 of the conspiracy. A person becomes a member of a conspiracy
21 by associating himself with a common plan or scheme knowing
22 the central aim or principal purpose of that common plan or
23 scheme and intending to help bring about its success.

24 As is the case with every count of the indictment,
25 in order to find a defendant guilty on the conspiracy count,

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2 you must find beyond a reasonable doubt that the defendant
3 acted knowingly and willfully. Specifically, you must find
4 that the defendant knowingly and willfully became a participant
5 in the conspiracy with knowledge of its unlawful purpose.

6 I have already explained the requirement of
7 knowledge of unlawful purpose and I defined for you the terms
8 knowingly and willfully in connection with the substantive
9 counts. To repeat briefly, an act is done knowingly if it
10 is done voluntarily and purposefully and not because of
11 mistake, inadvertence or other innocent reason.

12 An act is willful if it is done knowingly,
13 deliberately and done with an evil purpose. An act is not
14 done willfully if it is done as a result of a mistake,
15 carelessness, lack of an evil motive or purpose or for some
16 other innocent reason.

17 I have also explained to you that knowledge,
18 willfulness and intent exist in the mind, and told you how
19 you are to determine whether the requisite knowledge, willful-
20 ness and intent were present at the time in question.

21 Once you have found the conspiracy to exist and
22 a particular defendant knowingly and willfully participated
23 in it with knowledge of its unlawful purpose, the extent of
24 his participation has no bearing on his guilt or innocence.
25 The guilt of a conspirator is not measured by the extent or

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2 duration of his participation. Even if he participated in
3 it to a degree more limited than that of his co-conspirators,
4 he is equally culpable, so long as he was, in fact, a conspir-
5 ator.

6 Let me instruct you as to how you are to consider
7 the acts and statements of alleged co-conspirators.

8 You will recall that during the trial the acts
9 and statements of one alleged co-conspirator in the absence
10 of other alleged co-conspirators were received only with
11 respect to the particular person or persons making them.
12 However, I told you that I might or I might not give you
13 different instructions later.

14 Now I instruct you that you are to apply these
15 instructions only if you find that the government has
16 established the first element of the conspiracy, that is,
17 that a conspiracy, in fact, existed. If you do find that a
18 conspiracy, in fact, existed, then in considering the second
19 element, whether or not a particular member was a member of
20 the conspiracy, you may rely not only on his statements, but
21 on the statements and the declarations of the other alleged
22 co-conspirators.

23 Moreover, if you find that a conspiracy existed,
24 then any act or declaration made during the conspiracy and
25 in furtherance of it by a person found by you to have been a

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2 member of the conspiracy may be considered against any
3 defendant whom you find was also a member even though such
4 act or declaration was made in the absence and without the
5 knowledge of that defendant.

6 Conversely, such acts and declarations of a
7 conspirator which were made before the existence and after
8 the termination of the conspiracy may be considered only
9 against the person who made them.

10 Now we come to the third element you must consider
11 as to count one.

12 If you have found that the alleged conspiracy
13 existed and that the defendant whose guilt you are considering
14 was a member of it, then you must consider the overt act
15 requirement.

16 The offense of a conspiracy is complete when the
17 unlawful agreement is made and any single overt act is done
18 by one of the alleged conspirators in furtherance of the
19 conspiracy.

20 By the term "overt act," we mean an act committed
21 in an effort to accomplish some object or purpose of the
22 conspiracy. The overt act in this sense need not be a crime
23 in itself. It must, however, be an act which follows from
24 the conspiracy and is directed toward accomplishment of the
25 criminal purpose of the conspiracy.

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2 I think I read to you the overt acts that are
3 alleged, and they were four:

4 On or about August 4, 1974, Patrick Sherry and
5 Julius Celentano met at the Baychester Diner.

6 On September 3, 1974, Richard Hauptner supplied
7 Patrick Sherry with a silencer for a M-1 carbine.

8 On September 11, 1974, Patrick Sherry and Julius
9 Celentano sold twelve .22 caliber derringers and fifteen
10 .22 caliber revolvers at Patrick Sherry's home in City Island.

11 And on or about November 26th, the defendant
12 Richard Hauptner supplied Patrick Sherry with four .25
13 caliber automatic pistols and two .22 caliber revolvers
14 at Richard Hauptner's home in City Island.

15 In addition, the government must show that at
16 least one overt act was committed in the Southern District
17 of New York.

18 I charge you that the Southern District of
19 New York includes the Bronx, New York.

20 If you find beyond a reasonable doubt that a
21 conspiracy existed as charged in the indictment and that
22 during the existence of the conspiracy at least one of the
23 overt acts alleged was knowingly done by one or more of the
24 conspirators in furtherance of some object of the conspiracy,
25 proof of the conspiracy offense is complete. It is complete

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2 as to the defendant found by you beyond a reasonable doubt
3 to have been knowingly and willfully a member of the conspiracy
4 at the time the overt act was committed regardless of which of
5 the conspirators committed the overt act.

6 While the indictment charges in count 1 that
7 the conspiracy began in June of 1974 and continued to the
8 date of the filing of the indictment in January, 1975, I
9 repeat that it is not essential that the government prove
10 that the conspiracy started or ended on or about those specific
11 dates, it is sufficient if you find that, in fact, the
12 conspiracy was formed and existed for some substantial time
13 within the period set forth in the indictment and that at
14 least one overt act was committed in furtherance thereof in
15 that period.

16 Finally, the government contends that a
17 particular defendant may be found guilty of one or more of the
18 substantive offenses in counts 2 through 6 even if I
19 did not physically commit the act or aid and abet another to
20 do so, provided that you find that the defendant was a member
21 of an unlawful conspiracy and that another member of the
22 conspiracy committed the substantive offenses during the
23 course of and in furtherance of the conspiracy.

24 I shall now give you instructions in this regard,
25 but you will, of course, only have to consider this contention

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2 if you find beyond a reasonable doubt that a conspiracy
3 existed and that the defendant knowingly and willfully
4 joined the conspiracy with knowledge of its alleged unlawful
5 criminal purpose.

6 You will recall that I told you if you found
7 that a conspiracy existed and that if a particular defendant
8 was a conspirator, then such conspirator is liable for the
9 acts and statement of his co-conspirators, provided they
10 were made within the scope of the unlawful agreement as he
11 saw it during the pendency of the conspiracy and in further-
12 ance of its objectives.

13 The instructions I am about to give you grows
14 directly out of that rule.

15 In order to find a particular defendant
16 guilty of one or more of the substantive offenses in counts
17 2 through 6, you must find the following elements beyond a
18 reasonable doubt:

19 First, that some conspirator other than the defen-
20 dant you are considering has committed one or more of the
21 substantive offenses charged in counts 2 to 6 on or about the
22 date or dates charged in the indictment.

23 Second, that on the date the particular substantive
24 offense was committed by the other conspirator, a conspiracy
25 to commit that offense existed.

Third, that the defendant whose guilt or innocence you are considering was a part of the conspiracy to commit the substantive offense which you find was committed by another conspirator.

In this regard, you must remember and apply my instructions as to how to determine whether a defendant becomes a member of the conspiracy and as to knowledge and willfulness in connection with the conspiracy and as to knowledge and willfulness in connection with the conspiracy count; that is, you must find that the defendant you are considering knowingly and willfully joined the conspiracy with knowledge of its alleged unlawful criminal purpose.

Fourth. That the conspirator who physically committed the substantive offense was a member of the same conspiracy to commit that offense as the defendant you are considering.

Fifth. That the substantive offense committed by another conspirator was a crime committed in the course of and in furtherance of the conspiracy.

In considering all of the counts of the indictment, I instruct you that it is not a crime merely to possess the parts and components of firearms and you may not find either of the defendants guilty if you find that the defendants did no more than that.

I will now address myself to more general considera-

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2 tions which you must bear in mind during your deliberations.

3 First, I must emphasize again that there are
4 two defendants on trial. As to each count you must consider
5 separately whether each defendant has been proved guilty
6 beyond a reasonable doubt of the offense charged in that
7 count.

8 It is your duty to give separate personal considera-
9 tion to the case of each defendant. When you do so, you
10 must analyze what the evidence in the case shows with respect
11 to that individual, leaving out of consideration entirely
12 any evidence admitted solely with regard to the other defendant.

13 Each defendant is entitled to have his case
14 determined from the evidence as to his own acts and state-
15 ments and conduct and any other evidence in the case which
16 may be applicable to him.

17 The fact that you may find one of the accused
18 guilty or not guilty on a particular count should not influence
19 your verdict with respect to the other defendant or with
20 respect to any other count.

21 The government called as a witness Patrick Sherry,
22 who, if his testimony is to be accepted, was an accomplice
23 in the crimes charged against the defendants in this case.
24 It also called Mrs. Sherry, who in respect of this case, is
25 an unindicted co-conspirator.

In the prosecution of crime the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. The government must rely upon witnesses or transactions such as they are.

The fact that Patrick Sherry pleaded guilty of serious crimes, especially ones bearing on his veracity, may be considered by you as bearing on his credibility as a witness in this case.

There is no requirement in the federal courts that the testimony of an accomplice be corroborated. The government contends that the accomplice's testimony is corroborated by other evidence with respect to several key portions of the testimony. However, even without corroboration, conviction may rest upon the testimony of an accomplice if you believe it and find it credible.

An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may have an important stake in the outcome of the trial. An accomplice so testifying may believe that the defendants' acquittal would vitiate expected rewards which may have either explicitly or implicitly been promised to him in return for his plea of guilty and his testimony. Therefore, an accomplice's testimony should be reviewed with caution and scrutinized with care.

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2 I refer not only to Mr. Sherry, but I am referring
3 to both the Sherrys in this charge.

4 You must consider whether such testimony was
5 inspired by any motive of reward, of self-interest or hostility,
6 bias or prejudice against the defendants so that false testi-
7 mony or colored testimony was given in this proceeding.
8 If you find that to be the case, you are unhesitatingly to
9 reject the testimony.

10 Now, it does not follow that because a person
11 has acknowledged participation in the crimes charged that
12 he or she is incapable of giving a true version of what he
13 testified to in the case on trial. As to whether the version
14 is true or false is for you to decide.

15 Defendants Celentano and Hauptner have introduced
16 evidence of their good reputation in their communities for
17 honesty, integrity and truthfulness. The introduction of
18 such evidence bears upon the unlikelihood that a person with
19 this character would perpetuate the crimes charged in this
20 indictment and, therefore, you should consider this evidence
21 in this case in determining whether the prosecution had
22 proved defendants' guilt beyond a reasonable doubt.

23 Evidence of good reputation may, in itself,
24 create a reasonable doubt as to guilt where without such evi-
25 dence no reasonable doubt would exist.

On the other hand, if on all the evidence you are satisfied beyond a reasonable doubt that a defendant is guilty, a showing that he previously enjoyed a reputation for good character does not justify or excuse the offense and you should not acquit him merely because you believe that he is a person of good repute.

The testimony of a character witness is a reflection of a reputation in the community. The testimony of character reputation is not to be taken by you as the witness' opinion as to the guilt or innocence of the defendant on the charge in this court. The guilt or innocence of the defendant is for you and for you alone to determine.

Consequently, you may consider whether those with whom Hauptner and Celentano came in contact previously and with whom they established a community reputation were not informed or may have been misled in that these defendants did not reveal to them matters bearing on their character. That is a matter for you to determine from all the evidence.

As I told you before, the government has the burden of proving the charges against each defendant beyond a reasonable doubt.

A defendant does not have to prove his innocence. A defendant has the right to remain silent. He does not have to testify or present any evidence on his behalf and you may

2 not draw any inferences or conclusion or form any prejudice
3 because a defendant did not testify or present evidence.

4 On the other hand, the law permits a defendant
5 to testify in his own behalf if he wishes to do so, and
6 the defendant Julius Celentano has elected to testify.

7 The testimony of a defendant must be considered
8 by you as would the testimony of any other witness. You
9 must determine the credibility of a defendant who testified
10 and in so doing you must consider the deep personal interest
11 which every defendant has in the outcome of his case.
12 Indeed, it is fair to say that any defendant has the greatest
13 stake in the outcome. A defendant's interest in the result
14 of his trial is of a character possessed by no other witness.
15 That interest requires that you receive such testimony with
16 caution and subject it to the most careful consideration.

17 However, it by no means follows that simply be-
18 cause a person has a vital interest in the end result that he
19 is not capable of telling a truthful, candid and straightfor-
20 ward story. It is for you to decide to what extent, if at
21 all, his interest has affected or colored his testimony.

22 Under our oath as jurors you cannot allow considera-
23 tion of the punishment which may be inflicted upon a defendant
24 if he is convicted to influence your verdict in any way or in
25 any sense to enter into your deliberations. The duty of

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2 imposing sentence rests exclusively upon the Court. Your
3 function is to weigh the evidence in the case and to
4 determine the guilt or innocence of a defendant solely upon
5 the basis of such evidence and the law.

6 You are to decide the case upon the evidence
7 and the evidence alone and you must not be influenced by
8 any assumption, conjecture or sympathy or any inference not
9 warranted by the facts.

10 If you fail to find beyond a reasonable doubt
11 that the law has been violated, you should not hesitate
12 for any reason to return a verdict of acquittal.

13 But on the other hand, if you should find that
14 the law has been violated as charged, you should not hesitate
15 because of sympathy or any other reason to render a verdict
16 of guilty.

17 I would like to point out that you should not
18 enter the jury room with any preconceived pride of opinion.
19 You should not be unwilling to be convinced by intelligent
20 argument with your fellow jurors. Each juror has to answer
21 to his or her conscience and each has to decide this case for
22 himself or herself, but in so doing you should be willing to
23 consider the views of other jurors and to talk things out and
24 try your best to reach a unanimous agreement.

25 By the same token, you are not to give up a point

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2 of view that you conscientiously believe in simply because
3 you are outnumbered or outweighed.

4 Your verdict must be one with which each juror
5 agrees.

6 If during your deliberations you deem it necessary
7 to have a copy of the indictment or desire any of the exhibits,
8 they will be sent into you on request.

9 If you wish any portion of the testimony read
10 or the Court's charge reread, that will be done.

11 In conclusion, let me say that every criminal
12 case is important -- it is important to the government and
13 it is important to the defendant. It is your obligation to
14 decide the case on the evidence and the law as I have
15 charged it to you, and I now give the case to you with the
16 assurance that you will do just that.

17 Ladies and gentlemen, I will now confer with
18 counsel before turning the matter over to you, who will indi-
19 cate whether I have omitted part of the charge or whether I
20 should make some further statement to you and what not.

21 Counsel will join me in the robing room.

22 (In the robing room - counsel present)

23 THE COURT: Mr. Blossner?

24 MR. BLOSSNER: Mr. Celentano has no objections,
25 no exceptions to the charge.

MR. LEVY: Your Honor, I would ask your Honor to clarify your Honor's charge with reference to aiding and abetting insofar as when your Honor spoke of establishing each and every element of the particular counts where aiding and abetting was charged beyond a reasonable doubt.

It appeared from your Honor's charge that that was not necessary if they merely found that the defendants were aiding and abetting, and I would like your Honor to clarify that aspect of your charge.

I have no further exceptions.

THE COURT: I don't see where there can be any doubt about it, but I will certainly do that.

MRS. AMBLER: Your Honor, I have nothing. I thought it was clear.

THE COURT: I am going to give to the foreman a special verdict so they can record their conclusions.

All right.

(In open court - jury present)

THE COURT: Ladies and gentlemen, counsel have suggested that in my instruction to you on aiding and abetting that I may not have indicated to you that you must find, in order to find a person guilty of aiding and abetting, that you must find all the elements of that beyond a reasonable doubt.

2 I don't believe that I left any such confusion,
3 but out of an abundance of caution I will tell you that you
4 have to find that the elements of all, aiding and abetting,
5 substantive count, conspiracy, that all the necessary elements
6 have been satisfied to your satisfaction beyond a reasonable
7 doubt.

8 All right.

9 Miss Kennahan, I want to thank you for your
10 services and appreciate it, but your services are now over
11 and you may be excused.

12 (Alternate juror excused)

13 (A marshal was duly sworn by the clerk of the
14 Court.)

15 THE COURT: I am going to give to the foreman
16 a special verdict so that you can record on it your delibera-
17 tions.

18 All right.

19 (At 11:05 a.m., the jury retired to the jury
20 room to deliberate upon a verdict.)

21 THE COURT: I am going to have a hearing scheduled
22 here, so I will probably be in court for part of the morning
23 and afternoon, but I do want an agreement among counsel that
24 if the jury wants to see the indictment or wants to see any
25 exhibits that if I am not in court, if I am up in my chambers,

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2 that you can agree upon it and have it sent in without the
3 necessity of my coming down and formally convening the court.

4 MR. BLOSSNER: So stipulated by the defendant
5 Celentano.

6 MR. LEVY: So stipulated by the defendant Hauptner.

7 MRS. AMBLER: The government agrees to that.

8 (A note was received at 12:40 p.m.)

9 (In open court in the absence of the jury)

10 THE COURT: I received a note from the jury
11 and I am going to have to call them in.

12 This will be Court Exhibit number 2.

13 The first note was to see a copy of the indict-
14 ment.

15 (Court Exhibit numbers 1 and 2, respectively,
16 were marked for identification.)
xxx

17 THE COURT: The note reads as follows:

18 "Can the jury take into account alleged criminal
19 acts which took place prior to the opening date on or about
20 June of the indictment or are they limited in their delibera-
21 tions to acts committed between June and November 26th?"

22 As I recall, I gave a charge on that, didn't I?

23 (Pause)

24 THE COURT: I indicated that if you find, I
25 think in connection with my charge on conspiracy, that a

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2 conspiracy existed and any act or declaration during the
3 conspiracy and in furtherance of it by a person found by you
4 to be a member of the conspiracy - let me start again.

5 Moreover, if you find that a conspiracy existed,
6 then any act or declaration made during the conspiracy and
7 in furtherance of it by a person found by you to have been
8 a member of the conspiracy -- where are the defendants?

9 MR. BLOSSNER: They are outside, your Honor.
10 They weren't told to come in.

11 THE COURT: I can't have any discussion of this
12 without their presence.

13 (Defendants Celentano and Hauptner present in
14 court)

15 THE COURT: All right. Let me start again, since
16 the defendants are here.

17 Mr. Hauptner and Mr. Celentano, when I call
18 counsel in at any time, that means that both of you are re-
19 quired to be present.

20 The jury has just sent a message and it says,
21 Court Exhibit number 2, "Can the jury take into account
22 alleged criminal acts which took place prior to the opening
23 date on or about June of the indictment or are they limited
24 in their deliberations to acts committed between June and
25 November 26th?"

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2 Court Exhibit number 1 was a request by the jury
3 for a copy of the indictment, which pursuant to our agreement
4 was merely sent into them.

5 What I propose to do is merely reread my charge
6 or a portion of my charge, and my charge says, in substance,
7 that any act, if they find a conspiracy existed, then any
8 act or declaration made during the conspiracy and in further-
9 ance of it by a person found by them to have been a member
10 of the conspiracy may be considered against any defendant
11 who they also find to have been a member, even though the
12 acts and declaration was made in the absence and without
13 the knowledge of that particular person, but that any act
14 and declaration of a conspirator which was made before the
15 existence or after the termination of the conspiracy may be
16 considered only against the person who made them.

17 I suppose I ought to add that those acts, if
18 they consider them, only go to that particular person's
19 state of mind. That is what I propose to read them.

20 MR. LEVY: Your Honor, what about the request in
21 view of the June date?

22 I don't know what the jurors had in mind when
23 they asked the question, but I would suggest to the Court
24 that if they are speaking of a period of time remote from the
25 times when this was taking place or are considering things

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that the Court or counsel are not considering in their deliberations, that we in some way focus attention to in or around the time when this alleged conspiracy was taking place, rather than some remote time previous.

THE COURT: We don't have any evidence of any remote period.

MR. LEVY: I specifically call the Court's attention to the testimony regarding a packing slip in 1973, in December, which they may deem an act receiving the parts and they may be considering that act, though it has in no way any criminality been shown with regard to that act.

THE COURT: There is nothing involved in there.

MR. LEVY: I would ask that the Court, in giving the charge, direct the jury's attention to in or around the time when this alleged conspiracy was supposed to have been taking place.

MRS. AMBLER: I don't think we can speculate on exactly what the note means, but I think your Honor's proposed charge is about the fairest and clearest way to give it to them.

THE COURT: I think that Mr. Levy has a point, however.

MRS. AMBLER: Your Honor, there was some testimony admitted as to prior deals in guns, of course, and it was

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2 admitted because it possibly showed the beginnings of the
3 conspiracy.

4 THE COURT: I know that, and that is what I was
5 focusing on. I wasn't focusing on matters in 1973 that may
6 or may not have anything to do with the issue of dealing
7 with guns.

8 Maybe what I ought to do, these acts that they
9 are considering as alleged criminal acts have to relate to
10 dealing in guns.

11 Does that cover your problem?

12 MR. LEVY: Your Honor, I think if it was
13 specifically set forth that it were dealing in guns, it
14 probably would be sufficient.

15 I am still concerned mainly with two areas.
16 One I have already mentioned to the Court, and the
17 other is that testimony involving any deal with Thomas Cucchiaro.

18 The jury might not find that at the time those
19 deals were consummated that they were acts in furtherance
20 of a conspiracy.

21 THE COURT: Yes, but some of the testimony, I
22 think, about Thomas Cucchiaro occurred in April and under
23 my definition would only be able to be binding on Mr. Celentano
24 as to his state of mind, although some of the dealings were
25 in June in terms of Cucchiaro.

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2 I don't propose to go into the specifics of this
3 now.

4 MR. LEFY: One of the difficulties, your Honor,
5 and I guess at all times when a note such as this is given,
6 is that the Court and counsel have no idea what acts the
7 jurors have in mind and we can only speculate and conjecture
8 at this point.

9 THE COURT: Right.

10 MR. LEVY: I am just concerned that if your Honor
11 were to limit his instructions to the particular charge
12 that has already been read that the jury will in some way
13 misread that charge, and if it were acts not related to
14 gun dealing at the time or place when a conspiracy were taking
15 place, such as, for example, the alleged testimony by Vincent
16 Hauptner as to having seen a gun back in April of 1974 or
17 the testimony of Patrick Sherry as to having seen a gun in
18 January of 1974.

19 THE COURT: I have already indicated in that re-
20 gard that a single transaction -- we have covered that --
21 doesn't deal with it.

22 I want to be as fair as I can, Mr. Levy, about
23 this and that is why I called you in to try to give me some
24 help in regard to it. I am trying my best to reach a point
25 where it would be satisfactory, and the best I can come up with

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2 i that these acts that they are considering have to be acts
3 that have some relationship to dealing in guns, which is
4 the whole subject of the conspiracy in the indictment as
5 covering the problem.

6 If that is agreeable, I will do it that way.

7 If you have a better suggestion, I will be very
8 pleased to hear it.

9 MR. LEVY: The only thing I would ask your Honor
10 to consider modifying the proposed suggested charge is to
11 indicate to the jury that it has to bear a relationship to
12 the conspiracy being in some proximity in time when this
13 alleged conspiracy was taking place.

14 Certainly anything that was done in the year
15 1973 --

16 THE COURT: That actually isn't correct. That
17 is an incorrect statement. If it is agreeable with the
18 government and in the context of this case, because all of
19 the acts that the government is concerned about certainly
20 occurred in the proximity of June, as far as I can recall,
21 the testimony, if you have no objection to it, I will indicate
22 that. But, of course, that is not really a correct statement
23 of the law.

24 MRS. AMBLER: Yes, your Honor. I have no
25 objection to your --

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2 THE COURT: Because acts a year or so ahead
3 of time, if they are similar acts, may relate to a particular
4 conspirator's state of mind in regard to something he has
5 done subsequently.

6 MRS. AMBLER: If your Honor just intends to say
7 some proximity, the government has no objection.

8 THE COURT: All right. Then bring the jury in.
9 (Jury present)

10 THE COURT: I have your note, which has been
11 marked as Court Exhibit number 2.

12 "Can the jury take into account alleged criminal
13 acts which took place prior to the opening date on or about
14 June of the indictment or are they limited in their delibera-
15 tions to acts committed between June and November 26th?"

16 I think when I gave you my charge on conspiracy
17 I think I covered the point, but let me repeat:

18 I think that after I had instructed you on the
19 elements of a conspiracy, how you would go about finding
20 whether or not a conspiracy existed, I then instructed you
21 with regard to the acts and statements of alleged co-conspirators
22 and how you were to utilize them.

23 I said that if you find that a conspiracy existed,
24 then any act or declaration made during the conspiracy and
25 in furtherance of it by a person found by you to have been

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2 a member of the conspiracy may be considered against any
3 defendant whom you find was also a member, even though such
4 act or declaration was made in the absence and without the
5 knowledge of that defendant.

6 That would be acts and declarations made during
7 the period specified in the indictment.

8 Conversely, I said, such acts and declarations
9 of a conspirator which were made during the existence or
10 after the termination of a conspiracy may be considered only
11 against the person who made them and that those acts are
12 considered only in respect to the state of mind of that
13 person in regard to the charge which is before you.

14 In the context of the facts in this case, I
15 want to modify that slightly to indicate that such acts and
16 declaration have to have two further qualifications:

17 They have to relate in some way to dealing in
18 guns, which is the subject before you, and they have to have
19 some proximity to the date that is set forth in the indictment.

20 So when we say conversely, such acts of a conspirator
21 are made before the existence or after the termination, we
22 are talking about things, one, that are close to the dates
23 and, two, that have some relationship to dealing in guns, and
24 if you consider those you can consider them only in respect
25 to the state of mind of the person whom you have found to

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2 have been a member of the conspiracy as I set out.

3 Now, I hope that is clear.

4 I am going to assume it is.

5 THE FOREMAN: Is it possible to ask a question?

6 THE COURT: I think that -- all right. You are
7 asking me a question that is in the mind of the jury?

8 THE FOREMAN: Yes.

9 THE COURT: I will listen to it. I don't know
10 whether I can answer it or not.

11 THE FOREMAN: On or about, just how far before
12 or after would be included in that time?

13 THE COURT: All I can repeat is that there has
14 to be in the context of this case, that it has to have some
15 close proximity in time, and I think that that is about all
16 I can say about it.

17 I have given you three definitions:

18 One, it has to relate to dealing in guns; two,
19 it has some close proximity in time to June and, three, you
20 are to consider it only after you have found that the
21 conspiracy existed and that the individual you are considering
22 it as to as a member of the conspiracy and it relates only
23 to his state of mind as to intent, knowledge and willfulness
24 to commit the acts that are set forth in the indictment.

25 I think that is as clear as I can make it.

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2 (At 1:00 p.m., the jury returned to the jury room
3 to continue to deliberate upon a verdict.)

4 THE COURT: I think counsel in both cases,
5 Uneeda Doll and in the present case, it is time for all
6 of us to adjourn for lunch. We will return at two o'clock.

7 (At 4:15 p.m. in open court in the absence of
8 the jury.)

9 THE COURT: I think you know what has been asked.

10 MR. BLOSSNER: Yes, your Honor.

11 MRS. AMBLER: Yes, your Honor.

12 (Jury present)

13 THE COURT: I have your two requests, Court
14 Exhibit 4, to reiterate the definition of engaging in the
15 business - you say as dealers, but the phrase is engaging in
16 the business of dealing in firearms, and I will read that
17 to you.

18 You request that Agent D'Atri's testimony as to
19 what happened at the diner, I think that has been segregated
20 and I will ask the court reporter to read that to you.

21 (A portion of the witness D'Atri's direct and
22 cross examination was read to the jury.)

23 THE COURT: I think I first used the term in
24 reference to count 2 of the indictment and I said that one
25 of the elements is from in or about June of 1974 and continuing

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2 until November, 1974, the defendants whose guilt or
3 innocence you are considering engaged in the business of
4 dealing in firearms. That is one of the elements of the
5 crime.

6 I then asked further on, what does that phrase
7 mean?

8 I described it for you as follows:

9 The word "firearm" as used in count 2 means
10 any weapon which will or is designed to or may readily be
11 converted to expel a projectile by the action of an explosive.

12 The term "dealer" as used in the indictment means
13 any person engaged in the business of selling firearms or
14 ammunition at wholesale or retail. A business is that which
15 occupies time, attention and labor for the purpose of liveli-
16 hood or profit.

17 In order for the government to prove that a
18 particular defendant was engaged in the business of dealing
19 in firearms, it is not sufficient for the government to prove
20 that the defendant was involved only in a single transaction
21 involving the sale of firearms. However, such a transaction
22 may be considered by you along with the other evidence in
23 your determination of whether this single activity, this
24 activity, was a continuing one.

25 It is not a necessary element of the crime that

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2 the particular defendants only business be that of selling
3 firearms, nor may it be a significant source of income for
4 him.

5 I think that is all.

6 (At 4:25 p.m., the jury returned to the jury
7 room to continue to deliberate upon a verdict.)

8 THE COURT: It is my intention, ladies and
9 gentlemen -- I hadn't anticipated that the deliberations
10 would take this long and so, therefore, I gave no notice
11 of it, but if the jury does not reach a verdict within
12 roughly an hour, I am going to have them sequestered for
13 the night. I am going to do it that early, because if I
14 do it now they will have to be taken to their various homes
15 to get toothbrushes and all that sort of thing. But that
16 is my intention if no verdict comes or they are not close
17 to a verdict by 5:30, they will be sequestered for tonight.

18 (At 4:50 p.m., in open court - jury present)

19 THE CLERK: Mr. Foreman, has the jury agreed to
20 a verdict?

21 THE FOREMAN: They have.

22 THE CLERK: Would you read your verdict, please.

23 THE FOREMAN: Richard Hauptner on count 1, guilty.

24 Count 2, guilty.

25 Count 3, guilty.

Certificate of Service

Sept 22, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to appellant.

Sheila Gosteny